No.

IN THE SUPREME COURT OF THE UNITED STATES

VICTOR BRANCACCIO, PETITIONER

v.

STATE OF FLORIDA, RESPONDENT.

On Petition for a Writ of Certiorari to
the District Court of Appeal of Florida, Fourth District

PETITION FOR A WRIT OF CERTIORARI

CAREY HAUGHWOUT
Public Defender

Paul Edward Petillo
Assistant Public Defender
Counsel of Record

Office of the Public Defender
Fifteenth Judicial Circuit of Florida
421 Third Street
West Palm Beach, FL 33401
(561) 355-7600
ppetillo@pd15.state.fl.us
appeals@pd15.org

QUESTION PRESENTED

Whether Florida courts are refusing to consider Eighth Amendment claims in violation of the Supremacy Clause by treating *Virginia v. LeBlanc*, 137 S. Ct. 1726 (2017) (*per curiam*), a case arising under federal habeas review, as a decision on the merits of the Eighth Amendment issue?

RELATED PROCEEDINGS

The proceedings listed below are directly related to the above-captioned case in this Court:

State of Florida v. Victor Brancaccio, No. 93-1592-CF A (Fla. 19th Jud. Cir.).
Brancaccio v. State, 2020 WL 4530650 (Fla. 4th DCA Aug. 6, 2020).

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

IN THE SUPREME COURT OF THE UNITED STATES

No.

VICTOR BRANCACCIO, PETITIONER,

v.

STATE OF FLORIDA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

PETITION FOR A WRIT OF CERTIORARI

Victor Brancaccio, respectfully petitions for a writ of certiorari to review the judgment of the District Court of Appeal of Florida, Fourth District.

OPINION BELOW

The opinion of the District Court of Appeal is reported as *Brancaccio v. State*, 2020 WL 4530650 (Fla. 4th DCA Aug. 6, 2020), and is reprinted in the appendix. A1.

JURISDICTION

The District Court of Appeal affirmed the trial court's order denying Brancaccio relief on August 6, 2020. A1. The decision was "Per Curiam. Affirmed." A1. This decision was final, as the Florida Supreme Court has no jurisdiction to review such decisions. *See Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 139 n.4 (1987) (acknowledging that "[u]nder Florida law, a per curiam affirmance issued without opinion cannot be appealed to the State Supreme Court" and therefore petitioner "sought review directly in this Court."). This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

I. The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

II. Article VI, Clause 2, of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

III. 28 U.S.C. § 2254 provides in relevant part:

> State custody; remedies in Federal courts
>
> * * *
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

In 1993, at age 16, Victor Brancaccio committed first-degree murder and kidnapping with a weapon. A2-A3. He was sentenced in 1999 to life imprisonment on each offense.[1] A3. The sentence for first-degree murder had parole eligibility after 25 years, and the sentence for kidnapping had no parole eligibility. A3.

In 2012, Brancaccio moved to correct his sentences pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012), and *Graham v. Florida*, 560 U.S. 48 (2010). A2-A26. The trial court denied the motion because at that time Florida's district courts of appeal had held that *Miller* was not retroactive, and there was a split of authority on whether *Graham* applied to juvenile offenders who committed both homicide and non-homicide offenses. A27-A30, A69-A70.

Three years later, in 2015, Brancaccio filed another motion for postconviction relief. A31-A36. By then, most of the legal dust had settled on juvenile resentencings in Florida. The State agreed that Brancaccio was entitled to resentencing on his kidnapping offense, and it said that whether he was entitled to resentencing on the murder depended on the disposition of *Atwell v. State*, 128 So.

---

[1] Brancaccio's first conviction was reversed on the ground that the trial court erred in refusing to instruct the jury on his involuntary intoxication defense. *Brancaccio v. State*, 698 So. 597 (Fla. 4th DCA 1997). There was strong evidence that the killing was the result of Brancaccio's use of Zoloft, which was negligently prescribed to him when he was involuntarily hospitalized. *See Brancaccio v. Mediplex Management of Port St. Lucie, Inc.*, 711 So. 2d 1206 (Fla. 4th DCA 1998). Brancaccio's second conviction was affirmed. *Brancaccio v. State*, 773 So. 2d 582 (Fla. 4th DCA 2001). When further evidence was discovered concerning the dangerous side effects of Zoloft on minors, Brancaccio filed a motion for postconviction relief. The trial court denied the motion and the District Court of Appeal affirmed. *Brancaccio v. State*, 27 So. 3d 739 (Fla. 4th DCA 2010).

3d 167 (Fla. 4th DCA 2013), *rev. granted* 160 So. 3d 892 (Fla. 2014). A38-A40. The trial court agreed with the State that Brancaccio should be resentenced on his kidnapping offense and that the sentencing hearing would be scheduled after the supreme court decided *Atwell*. A42.

The next day the Florida Supreme Court decided *Atwell v. State*, 197 So. 3d 1040 (Fla. 2016). The court conducted an in-depth analysis of Florida's parole system as applied to juvenile offenders and found that it failed to comply with this Court's decisions in *Miller*, *Graham*, and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). The court held: "We conclude that Florida's existing parole system, as set forth by statute, does not provide for individualized consideration of Atwell's juvenile status at the time of the murder, as required by *Miller*, and that his sentence, which is virtually indistinguishable from a sentence of life without parole, is therefore unconstitutional." *Atwell*, 197 So. 3d at 1041.

In light of *Atwell*, the State agreed that Brancaccio was entitled to resentencing on both counts. A42-A45. A resentencing hearing was held on January 16, 2018, and January 17, 2018. A71. At the conclusion of the hearing, the trial court asked for written closing arguments. A71.

A few months later, the Florida Supreme Court *sua sponte* overruled *Atwell* in *State v. Michel*, 257 So. 3d 3 (Fla. 2018), *cert. denied sub nom. Michel v. Florida*, 139 S. Ct. 1401 (2019), and *Franklin v. State*, 258 So. 3d 1239 (Fla. 2018), *cert.*

denied sub nom. Franklin v. Florida, 139 S. Ct. 2646 (2019).[2] The court did so on the basis of *Virginia v. LeBlanc*, 137 S.Ct. 1726 (2017) (*per curiam*), a decision applying the deferential standard under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The Florida Supreme Court, however, treated *LeBlanc* as a decision on the merits of the underlying constitutional claim.[3] This is important because the Florida constitution requires courts to rule in lockstep with this Court's Eighth Amendment merits decisions. Art. I, § 17, Fla. Const. (If this Court holds that a punishment does not violate the Eighth Amendment, then the Florida Constitution mandates that Florida courts rule the same way.) The Florida Supreme Court stated: "[I]nstructed by a more recent United States Supreme Court decision, *Virginia v. LeBlanc*, —— U.S. ——, 137 S.Ct. 1726, 198 L.Ed.2d 186 (2017), we have since determined that the majority's analysis in *Atwell* improperly applied *Graham* and *Miller*." *Franklin*, 258 So. 3d at 1241 (citing *State v. Michel*).

The trial court declined to resentence Brancaccio on the murder count on the

---

[2] The narrow issue before the court in *Michel* and *Franklin* was whether the relief in *Atwell* was confined to juvenile offenders with "presumptive parole release dates" that exceed their life expectancy. In neither case did the State argue that *Atwell* was wrongly decided and should be overruled. The briefs and other pleadings can be viewed here: https://bit.ly/3cX8EKQ (*Franklin*); https://bit.ly/2GDcv3w (*Michel*).

[3] *LeBlanc* was decided after the briefs were filed in *Michel* and *Franklin*. The State did not file *LeBlanc* as supplemental authority, and the Florida Supreme Court did not ask the parties to address it. Instead, the court acted as a "self-directed board[] of legal inquiry and research," *Carducci v. Regan*, 714 F. 2d 171, 177 (D.C. Cir. 1983) (Scalia, J.), and *sua sponte* overruled *Atwell* on the authority of *LeBlanc*. *Compare United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) ("In our adversarial system of adjudication, we follow the principle of party presentation.").

authority of *Michel* and *Franklin*. A48-A49. In a thoughtful order, the trial court resentenced Brancaccio on the kidnapping count to 40 years in prison with a sentence-review hearing after 20 years. A50-A59.

Brancaccio appealed to the Fourth District Court of Appeal. He argued that this Court's decision in *Madison v. Alabama*, 139 S.Ct. 718 (2019), made it clear that the Florida Supreme Court's treatment of *LeBlanc* in *Michel* and *Franklin* as a merits decision was a classic "deference mistake." A88-A94, A143. *See* Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. Chi. L. Rev. 643 (2015). The supreme court did not reexamine Florida's parole process, he argued, but instead used *LeBlanc* as a proxy to overrule *Atwell*. A88.

The Fourth District Court of Appeal affirmed. "Per Curiam. Affirmed." A1. This petition for writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

I. This Court should grant certiorari because Florida courts are violating the Supremacy Clause by treating *Virginia v. LeBlanc*, a case arising under federal habeas review, as a decision on the merits of the Eighth Amendment issue.

The Florida Supreme Court in *Michel* and *Franklin* closed the door on Eighth Amendment challenges to Florida's parole system as applied to juvenile offenders. The court did so on the authority of *Virginia v. LeBlanc*, 137 S. Ct. 1726 (2017) (*per curiam*), an AEDPA case that did not decide the constitutional question. In mistakenly relying on *LeBlanc*, the Florida Supreme Court failed to decide the merits of the constitutional issue. The court's abdication violates the Supremacy Clause of Article VI, cl. 2, which requires state courts to address constitutional questions on their merits. This Court should remand this case to the District Court of Appeal with instructions to evaluate Brancaccio's Eighth Amendment claim.

A. *Michel* and *Franklin* conflict with *LeBlanc* and this Court's longstanding practice in federal habeas cases of not reaching the merits of the case.

This Court routinely cautions in AEDPA cases that it has not reached the merits of the underlying federal claim. *E.g.*, *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2560 n.3 (2018) ("Because our decision merely applies 28 U.S.C. § 2254(d)(1), it takes no position on the underlying merits and does not decide any other issue."). This is because in order to prevail on federal habeas review, the defendant must prove that the state court's decision "involved an unreasonable application of" clearly established federal law. *Harrington v. Richter*, 562 U.S. 86, 100 (2011). The question for the federal court is not whether the state court's interpretation of a

constitutional provision was correct, but rather whether it was clearly unreasonable. *See Renico v. Lett*, 559 U.S. 766, 779 (2010) ("Whether or not the Michigan Supreme Court's opinion reinstating Lett's conviction in this case was *correct*, it was clearly *not unreasonable*.") (emphasis in original). This Court's decisions noting that its federal habeas precedent does not reach the merits of the underlying constitutional claim are legion.[4]

This Court's decision in *Madison v. Alabama*, 139 S. Ct. 718 (2019), brings this into focus. On direct review, this Court granted Madison relief on his Eighth Amendment claim that his dementia prevented him from understanding his death sentence. This Court noted that in *Dunn v. Madison*, 138 S.Ct. 9 (2017) (*per curiam*), it had denied Madison relief when his case was before the Court on habeas

[4] *E.g.*, *Kernan v. Cuero*, 138 S. Ct. 4, 8 (2017) ("We shall assume purely for argument's sake that the State violated the Constitution when it moved to amend the complaint. But we still are unable to find in Supreme Court precedent that 'clearly established federal law' demanding specific performance as a remedy."); *Kernan v. Hinojosa*, 136 S. Ct. 1603, 1606 (2016) (stating it was expressing "no view on the merits" of the claim); *Woods v. Etherton*, 136 S. Ct. 1149, 1152 (2016) ("Without ruling on the merits of the court's holding that counsel had been ineffective, we disagree with the determination that no fairminded jurist could reach a contrary conclusion, and accordingly reverse."); *Woods v. Donald*, 575 U.S. 312, 319 (2015) ("Because we consider this case only in the narrow context of federal habeas review, we express no view on the merits of the underlying Sixth Amendment principle.") (quotation simplified); *White v. Woodall*, 572 U.S. 415, 420-21 (2014) ("We need not decide here, and express no view on, whether the conclusion that a no-adverse-inference instruction was required would be correct in a case not reviewed through the lens of § 2254(d)(1)."); *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013) ("The Court expresses no view on the merits of the underlying Sixth Amendment principle the respondent urges. And it does not suggest or imply that the underlying issue, if presented on direct review, would be insubstantial."); *Smith v. Spisak*, 558 U.S. 139, 149 (2010) ("Whatever the legal merits of the rule or the underlying verdict forms in this case were we to consider them on direct appeal, the jury instructions at Spisak's trial were not contrary to 'clearly established Federal law.'") (quoting 28 U.S.C. § 2254(d)(1)).

review. This Court said that in *Dunn v. Madison* "we made clear that our decision was premised on AEDPA's 'demanding' and 'deferential standard.'" *Madison v. Alabama*, 139 S.Ct. at 725 (quoting *Dunn v. Madison*, 138 S.Ct. at 11-12). This Court said it had "'express[ed] no view' on the question of Madison's competency 'outside of the AEDPA context.'" *Id*. (quoting *Dunn v. Madison*, 138 S.Ct. at 11-12). But now that the case was on "direct review of the state court's decision (rather than in a habeas proceeding), AEDPA's deferential standard no longer governs." *Madison*, 139 S. Ct. at 726. This Court stated:

> When we considered this case before, using the deferential standard applicable in habeas, we held that a state court could allow such an execution without committing inarguable error. *See Madison*, 583 U.S., at ——, 138 S.Ct., at 11-12 (stating that no prior decision had "clearly established" the opposite); supra, at ——. Today, we address the issue straight-up, sans any deference to a state court.

Madison v. Alabama, 139 S.Ct. at 727. And after addressing the "issue straight-up, sans any deference to a state court," *id*., this Court granted Madison relief.

In *LeBlanc*, as in *Dunn v. Madison*, this Court stated it was not ruling on the merits of the underlying constitutional claim. *LeBlanc* involved a juvenile offender sentenced to life imprisonment for non-homicide offenses. His sentence was subject to Virginia's "geriatric release" program, which allowed him to petition for release at age sixty. After arguing unsuccessfully in state court that his sentence violated *Graham*, he filed a habeas petition under 28 U.S.C. § 2254. The district court granted the writ and the Fourth Circuit affirmed, holding that Virginia's geriatric release program did not provide juvenile offenders with a meaningful opportunity for release, and therefore the state court's ruling was an unreasonable application of

Graham. *LeBlanc*, 137 S. Ct. at 1728.

This Court held that the Fourth Circuit "erred by failing to accord the state court's decision the deference owed under AEDPA." *Id*. This was because "[i]n order for a state court's decision to be an unreasonable application of this Court's case law, the ruling must be 'objectively unreasonable, not merely wrong; even clear error will not suffice.'" *Id*. (quoting *Woods v. Donald*, 575 U.S. 312, 319 (2015)). *LeBlanc* analyzed the factors that the Virginia Parole Board must consider in determining whether to release a prisoner, including the "individual's history ... and the individual's conduct ... during incarceration." *Id*. at 1729. "Consideration of these factors," this Court said, "could allow the Parole Board to order a juvenile offender's conditional release in light of his or her 'demonstrated maturity and rehabilitation.'" *Id*. (citing *Graham*, 560 U.S. at 75). *LeBlanc* held that it was therefore not "objectively unreasonable" to conclude that the geriatric release provision satisfied *Graham*.

This Court in *LeBlanc* made it clear it was not ruling on the underlying Eighth Amendment claim; there were "reasonable arguments on both sides." *Id*. "With regards to [LeBlanc], these [arguments] include the contentions that the Parole Board's substantial discretion to deny geriatric release deprives juvenile non-homicide offenders a meaningful opportunity to seek parole and that juveniles cannot seek geriatric release until they have spent at least four decades in prison." *Id*. But those arguments "cannot be resolved on federal habeas review." *Id*. This Court "expresse[d] no view on the merits of the underlying Eighth Amendment

claim" and did not "suggest or imply that the underlying issue, if presented on direct review, would be insubstantial." *Id*. at 1729 (brackets, internal quotes, and citations omitted).

The Florida Supreme Court never acknowledged this clear language. It instead found that *LeBlanc* had "delineated" the requirements of the Eighth Amendment. *Michel*, 257 So. 3d at 4. The court held that "juvenile offenders' sentences of life with the possibility of parole after 25 years do not violate the Eighth Amendment of the United States Constitution as delineated by the United States Supreme Court in [*Graham*, *Miller*, and *LeBlanc*]." *Id*. It claimed that "*LeBlanc* … has clarified that the majority's holding [in *Atwell*] does not properly apply United States Supreme Court precedent." *Id*. at 6. But this Court in *LeBlanc* did no such thing: this Court explicitly stated that it was not ruling on the merits of the Eighth Amendment issue.

The Florida Supreme Court concluded that when this Court held that the state court's decision in *LeBlanc* was not "objectively unreasonable," that meant that the geriatric release program was constitutional. That is simply incorrect. "[W]hen the Court decides a habeas case, it speaks not to the meaning of the Constitution, but to the much more obscure question of whether a particular interpretation or application of the Constitution was unreasonable at the time it was made in light of then existing Supreme Court precedent (which may well have been subsequently superseded)." Michael M. O'Hear, *Bypassing Habeas: The Right to Effective Assistance Requires Earlier Supreme Court Intervention in Cases of*

Attorney Incompetence, 25 Fed. Sent. R. 110, 118 (2012). And when state courts make this mistake, they "create[] a precedent that may be precisely the opposite of what" this Court might decide outside AEDPA's "prevailing deference regime." Masur & Ouellette, 82 U. Chi. L. Rev. at 651. That Madison was denied relief in *Dunn v. Madison*, but obtained it in *Madison v. Alabama*, vividly makes this point.

The Florida Supreme Court in *Michel* erred in viewing *LeBlanc* as a merits decision, and it repeated this error in *Franklin's* majority opinion. *Franklin*, 258 So. 3d at 1241 ("[I]nstructed by [*LeBlanc*], we have since determined that the majority's analysis in *Atwell* improperly applied *Graham* and *Miller*.").

Brancaccio was entitled to resentencing on his murder conviction until *Michel* and *Franklin* overruled *Atwell* on the authority of *LeBlanc*. This is not to deny that the Florida Supreme Court could overrule *Atwell*; but if it does, the court must once again engage in a rigorous constitutional analysis so it can determine whether Florida's parole process, as applied to juvenile offenders, satisfies the Eighth Amendment.

B. *Michel* and *Franklin* conflict with other state courts of last resort that correctly recognize that *LeBlanc* was not a merits decision.

Other courts have ruled that *LeBlanc* speaks only to the limitations of federal habeas review, not to the merits of the Eighth Amendment issue. In *People v. Contreras*, 4 Cal. 5th 349, 229 Cal.Rptr.3d 249, 411 P.3d 445 (2018), the California Supreme Court reviewed lengthy sentences imposed on two juvenile offenders. While the case was pending before the court, the California Legislature enacted an "elderly parole program." *Contreras*, 411 P.3d at 458.

In addressing whether that program satisfies *Graham's* requirement that juvenile offenders be afforded a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation, the California Supreme Court discussed *LeBlanc*. It said that this Court "had emphasized that it was applying the deferential standard of review required" by AEDPA, and that this Court had recognized that there were reasonable arguments on both sides of the Eighth Amendment issue. *Contreras*, 411 P.3d at 460. The court declined to resolve the issue of whether California's elderly parole program would satisfy the Eighth Amendment (leaving it for the lower courts to address first); and it recognized that, similarly, this Court had not resolved the issue of whether Virginia's geriatric release program satisfied the Eighth Amendment: "Like the high court in *LeBlanc*, we decline to resolve in this case whether the availability of an elderly parole hearing at age 60 for a juvenile nonhomicide offender satisfies the Eighth Amendment concerns set forth in *Graham*." *Contreras*, 411 P.3d at 461.

Likewise, the Court of Appeals of Maryland recognized that this Court in *LeBlanc* did not rule on the merits of the underlying claim. *Carter v. State*, 461 Md. 295, 315, 192 A.3d 695, 706 n.9 (Md. 2018). One of the issues in *Carter* was whether Maryland's parole process provides the meaningful opportunity for release required by *Graham*. In distinguishing parole from executive clemency, the court discussed *LeBlanc* and determined that that case provided "limited guidance…." *Id*. The court stated: "The Supreme Court explicitly did not decide whether geriatric release would satisfy the Eighth Amendment, but only that the Fourth Circuit had not

accorded the state court decision on the issue the deference due under AEDPA and that the state court decision was 'not objectively unreasonable.'" *Id*. The court stated: "[W]hile such a geriatric release program might satisfy *Graham*, the Court has not reached such a holding." *Id*.

California and Maryland have correctly recognized that a federal habeas decision like *LeBlanc* does not control a case on direct review. Ohio similarly avoided this pitfall in *State v. Moore*, 76 N.E.3d 1127 (Oh. 2016). That case held that a juvenile's de facto life sentence violated *Graham*. Chief Justice O'Connor criticized the dissent's reliance on Sixth Circuit federal habeas decisions, because those decisions were based on the "'highly deferential' standard imposed by AEDPA." *Moore*, 76 N.E.3d at 1153 (O'Connor, C.J., concurring). She emphasized that "[w]e who sit at the pinnacle of a state judiciary should be reluctant to adopt the limited standards of federal habeas jurisdiction as a proper proxy for the rigorous constitutional analysis that claims like Moore's deserve." *Id*. at 1155.

It is important that state courts "follow both the letter and the spirit of [this Court's] decisions." *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 846 (1982). And a "good rule of thumb for reading [this Court's] decisions is that what they say and what they mean are one and the same[.]" *Mathis v. United States*, 136 S.Ct. 2243, 2254 (2016). Therefore, when this Court states in an AEDPA decision that it is not ruling on, or expressing a view of, the underlying federal claim, lower courts must respect that statement. The Florida Supreme Court did not.

C. This is an important federal issue because state courts have an obligation under the Supremacy Clause to consider federal claims and they are not doing so if they rely on an AEDPA decision like *LeBlanc*.

State courts have a duty under the Supremacy Clause to hear federal claims. *See Haywood v. Drown*, 556 U.S. 729, 732-35 (2009); *Howlett v. Rose*, 496 U.S. 356, 367-68 (1990); *Testa v. Katt*, 330 U.S. 386, 391-94 (1947); *see also* Charlton C. Copeland, *Federal Law in State Court: Judicial Federalism Through a Relational Lens*, 19 Wm. & Mary Bill Rts. J. 511, 514-15 (2011). In fact, the deferential standard of review in AEDPA cases is premised on the belief that states will make "good-faith attempts to honor constitutional rights." *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (quoting *Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998)). Similarly, federalism and comity concerns require that state courts be given the first opportunity to adjudicate constitutional questions on the merits. *See*, *e.g.*, *Jimenez v. Quarterman*, 555 U.S. 113, 121 (2009).

The Florida Supreme Court's reliance on *LeBlanc* upended this framework. In violation of the Supremacy Clause, the court substituted Eighth Amendment analysis with reliance on an AEPDA decision that did not settle the constitutional issue. When state courts defer to this Court's AEDPA jurisprudence to determine the scope of a constitutional right, they effectively preclude a defendant from having the merits of his or her constitutional claim adjudicated in state or federal court. For example, if this Court were to rule that a federal court exceeded its bounds

under AEDPA in concluding that whipping is a cruel and unusual punishment,[5] Florida would mistakenly conclude from that decision that whipping is constitutional, and it would turn aside any claim to the contrary on the ground that Florida courts must rule in lockstep with this Court. Thus, the constitutionality of whipping would not be addressed in state or federal court, and the defendant would suffer the lash unless this Court granted a petition for writ of certiorari.

In *Atwell*, the Florida Supreme Court held that Florida's parole process violated the Eighth Amendment as applied to juvenile offenders. Nothing this Court said in *LeBlanc* undermined that holding. This Court did not "delineate" or "clarify" the requirements of the Eighth Amendment, and so the last true pronouncement about Florida's parole process as applied to juveniles was that it was unconstitutional.

Atwell led to the resentencing and release of at least 67 parole-eligible juvenile offenders. A146-A147. Nearly all of these offenders were repeatedly denied parole, but they were able to prove to a judge that they were rehabilitated and fit to re-enter society; that is, they "demonstrate[d] the truth of *Miller's* central intuition—that children who commit even heinous crimes are capable of change." *Montgomery*, 136 S. Ct. at 736. But some parole-eligible juvenile offenders like Brancaccio were not resentenced in time, and the mistaken decisions in *Michel* and *Franklin* have thrust them back into a parole process that was deemed

[5] Although this Court has precedent involving prison beatings, *see Hudson v. McMillian*, 503 U.S. 1 (1992), it has no clearly established precedent declaring the practice of whipping unconstitutional.

unconstitutional in *Atwell*. The *Atwell* court's holding has not been overturned by rigorous constitutional analysis, but instead by a misapplication of *LeBlanc*. This Court should therefore grant certiorari, vacate the judgment, and remand this case for reconsideration with the understanding that *LeBlanc* was not a merits decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CAREY HAUGHWOUT
Public Defender

Paul Edward Petillo
Assistant Public Defender
Counsel of Record

Office of the Public Defender
Fifteenth Judicial Circuit of Florida
421 Third Street
West Palm Beach, FL 33401
(561) 355-7600
ppetillo@pd15.state.fl.us
appeals@pd15.org

OCTOBER 5, 2020